

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID BOWEN,

Plaintiff,

Case No. 08-13316

DOCTOR FINAN,

HON. AVERN COHN

Defendant.

ORDER OF DISMISSAL WITHOUT PREJUDICE

I.

This is a prisoner civil rights case under 42 U.S.C. § 1983. In 2008, plaintiff, then a state prisoner,¹ filed a complaint against defendant, “Doctor Finan,” alleging violations of his 8th Amendment constitutional rights. Plaintiff alleges that while incarcerated, a correctional officer required him to move from one unit to another which involved climbing stairs that plaintiff says was contrary to his medical detail. Plaintiff further alleges he fell down and hurt his back. Plaintiff also alleges that he received inadequate medical care. As will be explained, defendant has not been served. Accordingly, defendant will be dismissed without prejudice and this case will be closed.

II.

The complaint was filed on August 1, 2008. Plaintiff made no attempt to serve defendant. Accordingly, on March 6, 2009, a magistrate judge issued an order to show cause as to why the case should not be dismissed under Federal Rules of Civil Procedure 4(m) due to plaintiff’s failure to serve defendant with the summons and

¹Plaintiff was released from custody during the pendency of this case.

complaint. (Doc. 6). On March 26, 2009, plaintiff responded with a motion to effectuate service (Doc. 7). In the motion, plaintiff said that his medical condition and his location in segregation impeded his ability to complete filings and obtain assistance with this suit. On April 22, 2009, the magistrate judge, noting plaintiff's pro se status and problems effectuating proper service, directed that service be affected "by United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose." Fed. R. Civ. P. 4(c)(2). (Doc. 8).

On May 14, 2009, a waiver of service form was returned unexecuted against defendant. (Doc. 11).

Thereafter, several attempts were made to serve defendant over the course of over three years. First, on August 18, 2009, a magistrate judge issued an order requiring the Michigan Department of Corrections (MDOC) to provide an address for defendant under seal as defendant no longer apparently worked for the MDOC. (Doc. 13). The magistrate judge issued two subsequent orders directing the MDOC to provide the U.S. Marshals with defendant's last known address. See Doc. 14, dated January 25, 2010 and Doc. 15, dated November 15, 2010. On August 19, 2011, a magistrate judge issued an order directing service on defendant by mail at the addressed provided under seal. (Doc. 19). On October 18, 2011, a magistrate judge issued an order directing personal service on defendant at the address previously provided. (Doc. 21). Finally, on August 8, 2012, a magistrate judge issued another order directing service on defendant. (Doc. 22). A waiver of service was returned unexecuted on September 20, 2012.

III.

The federal rules provide when a plaintiff is proceeding in forma pauperis, as is the case here, the U.S. Marshal, upon order of the Court, shall serve the summons and the complaint upon each defendant. Fed. R. Civ. P. 4(c)(3). As explained above, several attempts were made over the course of three years to serve defendant. Although plaintiff asked in 2009 for assistance in serving defendant, he has taken virtually no action on this case since that time. The last correspondence from plaintiff in the record is a January 26, 2010 letter in which plaintiff provides a new address. That was over two years ago. Under these circumstances, dismissal of defendant for failure to effect timely service is appropriate. See VanDiver v. Martin, 304 F. Supp. 2d 934, 942-43 (E.D. Mich.2004) (dismissing an in forma pauperis prisoner plaintiff for failure to perfect service under Rule 4(m)).

IV.

Accordingly, defendant is DISMISSED WITHOUT PREJUDICE under Fed. R Civ. P. 4(m). Because the sole defendant has been dismissed, this case is CLOSED.

SO ORDERED.

Dated: November 2, 2012

S/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, November 2, 2012, by electronic and/or ordinary mail.

S/Julie Owens
Case Manager, (313) 234-5160